Yussof Daniel bin Khairul Hisham v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL REVISION NO MA-43(A)-3–09 OF 2024
MOHD RADZI ABDUL HAMID J
13 DECEMBER 2024

Criminal Procedure — Acquittal or discharge — Discharge amounting to acquittal — Applicant was charged under s 12(2) of Dangerous Drugs Act 1952 and subsequently discharged not amounting to acquittal several times due to non-appearance of raiding officer as witness — Applicant filed application for revision of magistrate's order of discharge not amounting to acquittal — Whether applicant was prejudiced by delay in trials caused by continued absence of witness — Whether magistrate was right in making order for discharge not amounting to acquittal and not discharge amounting to acquittal — Whether applicant ought to be discharged and acquitted — Criminal Procedure Code ss 254(3), 323 & 376 — Dangerous Drugs Act 1952 s 12(2)

The applicant was charged under s 12(2) of the Dangerous Drugs Act 1952 but due to the failure of the raiding officer ('SP5') to appear before the court as a witness, the magistrate ordered the applicant to be discharged not amounting to acquittal ('DNAA'). The applicant was then charged again with the same offence but similarly, SP5 still failed to appear before the court and consequently, the magistrate made the same order. When the applicant was charged for the third time and the same situation happened whereby the court was informed that SP5 was in Sabah at the material time, the applicant applied to the magistrate to be acquitted but the magistrate still made the same order of DNAA. Aggrieved with the decision, the applicant filed the present application for revision pursuant to s 323 of the Criminal Procedure Code ('the CPC') to set aside the DNAA order and to substitute it with an order of discharge amounting to acquittal ('DAA'). The crux of the present application rested on the applicant's complaint that he was prejudiced by the delay in the trials caused by the continued absence of SP5. The issue arose was whether the magistrate was right in making the order for DNAA and not DAA under s 254(3) of the CPC.

Held, substituting the magistrate's order of DNAA with an order of DAA, discharging and acquitting the applicant of the charge, and returning the bail:

(1) In the case of *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] MLJU 1837, the Federal Court held that to invoke the application of s 254 of the CPC, there must be a deliberate communication from the prosecution that he would not further

prosecute. Although the default position was that the order was to discharge without acquittal, there remained the unfettered discretion of the court to make an order of acquittal where the facts and circumstances warranted so (see paras 10–11).

(2) The court found sufficient reasons for the court to exercise its discretion in favour of the applicant. Particularly, the prosecution could not offer any explanation to the court why SP5 remained in Sabah and why he could not make himself available at the trial. From the minutes of the magistrate court on 3 September 2024, the court noted that the prosecution stated that it had informed the investigating officer of the need for SP5's attendance but no action was taken. The fact that the prosecution was at loss over SP5's absence compounded by the investigating officers' inaction showed that the prosecution did not have control over the conduct of its case as dictated by s 376 of the CPC (see para 17).

(3) The expression 'the prosecution shall have control over the direction of all criminal proceedings and prosecutions' meant not only that the prosecution must act honestly, without fear or favour and to ensure that the prosecution of charges were based upon the legitimacy of its evidence and fair play to the accused, but also that the prosecution must manage its witnesses in the interest of timely conclusion of its case within the time allocated by the court, especially as in the present case when the accused had been DNAA and charged repeatedly (see para 18).

(4) The facts in the present application showed that the prosecution had had three opportunities under three separate cases to ensure the presence of SP5 but failed to do so. Although the prosecution maintained its intention to continue with the prosecution of the charge against the applicant, it would be a grave injustice on the applicant to have the charge looming over his head without any foreseeable certainty on when exactly the prosecution could conclude its case with the attendance of SP5. The applicant was stuck with the stigma that the public may perceive him of being guilty when he was charged over and over again with no prospect for him to present his defence (see para 21).

(5) It was an anathema to the principle of fair play and justice to allow the prosecution to use the provision of s 254 of the CPC to hold on to the charge and then charge an accused repeatedly on the basis that it intended to still prosecute the accused despite it being clear that there remained unresolved impediments in the progress of a trial. To allow such situation to continue without certainty when such impediments could be resolved would amount to an abuse of process of court. The court was of the firm view that when the conclusion of the prosecution's case could not be achieved despite multiple orders of DNAA and repeated refiling of a charge against the accused as in the present application then the

prosecution should not stand in the way of the accused's discharge and acquittal on the grounds of fair play and justice towards the accused. The prosecution must bear the consequences of its own failures. Based on the facts of the present application, there were merits to justify the exercise of the court's powers of revision and judicial discretion (see paras 23–25).

[Bahasa Malaysia summary

Pemohon dituduh di bawah s 12(2) Akta Dadah Berbahaya 1952 tetapi disebabkan kegagalan pegawai serbuan ('SP5') untuk hadir ke mahkamah sebagai saksi, majistret memerintahkan pemohon dilepaskan tanpa dibebaskan ('DNAA'). Pemohon kemudiannya didakwa sekali lagi atas kesalahan sama tetapi SP5 masih juga gagal hadir ke mahkamah dan seterusnya majistret membuat perintah yang sama. Apabila pemohon didakwa buat kali ketiga dan situasi yang sama berlaku di mana mahkamah dimaklumkan bahawa SP5 berada di Sabah pada masa material, pemohon memohon kepada majistret untuk dibebaskan tetapi majistret masih membuat perintah DNAA yang sama. Terkilan dengan keputusan tersebut, pemohon memfailkan permohonan semasa untuk penyemakan menurut s 323 Kanun Tatacara Jenayah ('KTJ') untuk mengenepikan perintah DNAA tersebut dan menggantikannya dengan perintah pelepasan berjumlah pembebasan ('DAA'). Inti pati dari permohonan semasa terletak pada aduan pemohon bahawa dia telah diprejudiskan akibat daripada kelewatan dalam perbicaraan yang disebabkan oleh ketiadaan SP5 secara berterusan. Isu yang timbul ialah sama ada majistret betul dalam membuat perintah untuk DNAA dan bukannya DAA di bawah s 254(3) KTJ.

Diputuskan, menggantikan perintah DNAA oleh majistret dengan perintah DAA, melepaskan dan membebaskan pemohon daripada pertuduhan, dan mengembalikan jaminan:

(1) Dalam kes *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] MLJU 1837, Mahkamah Persekutuan berpendapat bahawa untuk mencetuskan pemakaian s 254 KTJ, perlu ada komunikasi yang disengajakan daripada pihak pendakwaan bahawa dia tidak akan melanjutkan pendakwaannya. Walaupun kedudukan asalnya adalah bahawa perintahnya adalah untuk melepaskan tanpa membebaskan, namun mahkamah masih mempunyai budi bicara yang tidak berbelah bahagi untuk membuat perintah pembebasan jika fakta dan keadaan memerlukan mahkamah memerintahkan sedemikian (lihat perenggan 10–11).

(2) Mahkamah mendapati alasan yang mencukupi untuk mahkamah menggunakan budi bicaranya memihak kepada pemohon. Khususnya, pihak pendakwaan tidak dapat memberikan apa-apa penjelasan kepada mahkamah mengapa SP5 kekal berada di Sabah dan mengapa dia tidak boleh hadir pada perbicaraan tersebut. Daripada minit mahkamah majistret pada 3 September 2024, mahkamah mengambil maklum

bahawa pihak pendakwaan menyatakan bahawa ia telah memaklumkan pegawai penyiasat tentang keperluan kehadiran SP5 tetapi tiada tindakan diambil. Hakikat bahawa pihak pendakwaan berada dalam keadaan yang rugi disebabkan oleh ketiadaan SP5 ditambah dengan kegagalan pegawai penyiasat untuk bertindak menunjukkan bahawa pihak pendakwaan tidak mempunyai kawalan ke atas pengendalian kesnya seperti yang ditetapkan oleh s 376 KTJ (lihat perenggan 17).

(3) Ungkapan 'the prosecution shall have control over the direction of all criminal proceedings and prosecutions' bermaksud bukan sahaja pihak pendakwaan perlu bertindak jujur, tanpa rasa takut atau memihak dan untuk memastikan bahawa pendakwaan pertuduhan adalah berdasarkan kesahihan keterangannya dan keadilan kepada tertuduh, tetapi juga bahawa pihak pendakwaan perlu menguruskan semua saksinya bagi tujuan untuk memuktamadkan kesnya dalam tempoh yang ditetapkan oleh mahkamah, terutamanya apabila tertuduh telah dituduh dan diberikan DNAA berulang kali seperti dalam kes semasa (lihat perenggan 18).

(4) Fakta dalam permohonan semasa menunjukkan bahawa pihak pendakwaan mempunyai tiga peluang di dalam tiga kes berasingan untuk memastikan kehadiran SP5 tetapi mereka gagal berbuat demikian. Walaupun pihak pendakwaan mengekalkan hasratnya untuk meneruskan dengan pendakwaan pertuduhan tersebut terhadap pemohon, namun adalah merupakan satu ketidakadilan yang serius bagi pemohon jika pertuduhan tersebut terus menghantui fikirannya tanpa apa-apa kepastian yang boleh diramalkan tentang bila sebenarnya pihak pendakwaan boleh memuktamadkan kesnya dengan kehadiran SP5. Pemohon terperangkap dengan stigma bahawa orang ramai mungkin menganggap dia bersalah apabila dia didakwa berulang kali tanpa prospek untuk dia mengemukakan pembelaannya (lihat perenggan 21).

(5) Adalah satu penghinaan kepada prinsip 'fair play and justice' untuk membenarkan pihak pendakwaan menggunakan peruntukan s 254 KTJ untuk mengekalkan pertuduhan tersebut dan kemudian mendakwa tertuduh berulang kali atas dasar bahawa ia berhasrat untuk terus mendakwa tertuduh walaupun jelas bahawa masih terdapat halangan yang tidak dapat diselesaikan dalam perjalanan perbicaraan. Membenarkan keadaan sebegitu berterusan tanpa kepastian bila halangan tersebut dapat diselesaikan berjumlah kepada satu penyalahgunaan proses mahkamah. Mahkamah berpendirian tegas bahawa apabila kes pendakwaan tidak dapat dimuktamadkan walaupun dengan beberapa perintah DNAA dibuat dan pemfailan semula pertuduhan terhadap tertuduh sebanyak beberapa kali seperti dalam permohonan semasa, maka pihak pendakwaan tidak seharusnya menghalang pelepasan dan pembebasan tertuduh atas alasan 'fair play

and justice' terhadap tertuduh. Pihak pendakwaan perlu menanggung akibat daripada kegagalannya sendiri. Berdasarkan fakta permohonan semasa, terdapat merit untuk mewajarkan pelaksanaan kuasa penyemakan dan budi bicara kehakiman mahkamah (lihat perenggan 23–25).]

Cases referred to

Boucher v The Queen (1954) 110 Can CC 263 (refd)
Bunya ak Jalong v PP [2015] 5 MLJ 72; [2015] 5 AMR 1; [2015] 5 CLJ 893, CA (refd)
Cheak Yoke Thong v PP [1984] 2 MLJ 119; [1984] 1 CLJ Rep 87, FC (refd)
DPP v Arthurs [1999] IEHC 73 (refd)
Goh Cheng Chuan v PP [1990] 3 MLJ 401; [1990] CLJU 85; [1990] 1 LNS 85, HC (folld)
Johnson Tan Han Seng v PP; Soon Seng Sia Heng v PP; PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1 MLJ 193; [1985] CLJU 54; [1985] 1 LNS 54 (refd)
Koh Teck Chai v PP [1968] 1 MLJ 166; [2024] CLJU 1143 (refd)
Mohamed bin Kanathi Meerah Mydin v PP [2019] 2 MLJ 194; [2019] 2 CLJ 28, CA (refd)
Nicholas a/l Mazivanan v PP [2024] 12 MLJ 326; [2024] 9 CLJ 736, HC (refd)
PP v Ambika a/p MA Shanmugam [2021] 2 MLJ 723; [2021] 2 CLJ 522, CA (refd)
PP v Choo Chuan Wang [1987] MLJU 4; [1992] 2 CLJ 1242, HC (refd)
PP v Lau Ngiik Yin [2007] MLJU 668; [2008] 10 CLJ 410, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26; [1974] CLJU 118; [1974] 1 LNS 118 (refd)
Shiv Kumar v Hukum Chand & Anor (1999) 7 SCC 467, SC (refd)
Tan Hoo Eng v Pendakwa Raya [2019] MLJU 622; [2019] CLJU 893, CA (refd)
Vigny Alfred Raj a/l Vicetor Amratha Raja v PP [2022] MLJU 1837; [2022] 8 CLJ 1, FC (refd)

Legislation referred to

Criminal Procedure Code ss 323, 254, 254(3), 254A, 376
Dangerous Drugs Act 1952 s 12(2)
Federal Constitution art 5(1)

Ahmad Musthafi bin Mohamad (Hashim Amran Tabian Ahmad) for the applicant.
Nor Azizah bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Radzi Abdul Hamid J:

MATTER BEFORE THIS COURT

[1] This a decision on an application for revision brought by the applicant against the decision of the magistrate who had on 3 September 2024 given an order for discharge not amounting to acquittal after the prosecution's witness was not present at the trial for the third time in as many cases against the applicant based on the same offence.

BACKGROUND FACTS

[2] The applicant was initially charged in Case MA-82D-28–11 of 2022 on 2 November 2022 for an offence under s 12(2) of the Dangerous Drugs Act 1952. On 9 March 2024 the magistrate ordered the applicant to be discharged not amounting to acquittal ('DNAA') after the prosecution's witness SP5 who was the raiding officer in that case failed to appear to complete his examination in chief. The applicant was then charged again for the same offence in Case MA-82D-6–03 of 2024 and on 13 May 2024 SP5 again failed to appear as witness. Consequently the magistrate made the same order of DNAA. The prosecution was determined to continue prosecuting the applicant and the applicant was then charged again in Case MA-82D-28–08 of 2024 for the same offence on 6 August 2024 ('charge') and on 3 September 2024 for the third time SP5 was again absent from the trial. The court was informed that SP5 was in Sabah but it appears that the prosecution could not offer any information on why SP5 was in Sabah and not in court to give evidence.

[3] Counsel for the applicant then sought for the applicant to be discharged and acquitted of the charge on the grounds that the applicant has been prejudiced by the inordinate delay by the prosecution in completing their case. Instead of acquitting the applicant the magistrate made the same order of DNAA pursuant to s 254(3) of the Criminal Procedure Code ('the CPC') and directed that in the event the applicant is charged again the trial shall proceed on the same day.

[4] The applicant being dissatisfied with that decision seeks to move this court to exercise its powers of revision under s 323 of the CPC to set aside that order and to substitute it with an order discharging and acquitting the applicant of the charge.

ARGUMENTS OF PARTIES

[5] Learned counsel for the applicant essentially contends that the prosecution's inability to complete its case since 2022 due to SP5's absence has

prejudiced the applicant's right to a fair and speedy trial as guaranteed under art 5(1) of the Federal Constitution. Counsel argues that this is not a case where the applicant is still being charged under the same Case MA-82D-28–11 of 2022 but he has been charged repeatedly for the same offence under two separate cases after that and the applicant was DNAA each time. It was argued that the magistrate should have ordered the applicant to be discharged and acquitted of the charge when the prosecution cannot explain why SP5 was in Sabah and not in court to give evidence. The prosecution had the opportunity to secure the attendance of SP5 on two prior trials but failed and therefore the prosecution's statement to the court that they wish to continue with the prosecution against the applicant should not have been accepted. There was no guarantee that SP5 will appear if the applicant was charged again and that the trial can resume under s 254A of the CPC.

[6] Reference was made to the decisions in *Public Prosecutor v Choo Chuan Wang* [1987] MLJU 4; [1992] 2 CLJ 1242; *DPP v Arthurs* [1999] IEHC 73 and *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119; [1984] 1 CLJ Rep 87.

[7] The prosecution argues that this is a case where the trial had proceeded with four prior witnesses giving evidence and exhibits marked. The prosecution intends to complete its case and therefore intends to continue prosecuting the applicant. Thus, an opportunity should be given to the prosecution to locate SP5 and secure his attendance in court. This case ought to be distinguished from those cases where the prosecution has expressed its desire to not continue with prosecuting the accused as provided under s 254 of the CPC. For that reason the order to DNAA should not be disturbed.

THE LAW ON REVISION

[8] The law on revision and the power of the High Court in hearing revisions is settled law and needs no discussion. For the sake of completeness it would suffice to refer to the oft quoted decision in *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26; [1974] CLJU 118; [1974] 1 LNS 118, where Hashim Yeop A Sani J (as he then was) stated the following:

> The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

DELIBERATIONS

[9] The crux of this application rests on the applicant's complaint that he is prejudiced by the delay in the trials caused by the continued absence of SP5. It is indisputable that the law recognizes the accused's right to a speedy conclusion of the trial. It has been often said that delays in trial, especially in minor offences, will cause embarrassment and hardship the accused as he will be faced with the public's impression that he is guilty of the offence even before a decision is made.

[10] In determining whether the magistrate was right in making the order for DNAA and not DAA under s 254(3) of the CPC, there should be an appreciation of the requirements under s 254 and this was discussed in detail in the Federal Court case of *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] MLJU 1837; [2022] 8 CLJ 1. It was held that to invoke the application of s 254 there must be a deliberate communication from the prosecution that he will not further prosecute. The default position as opined by the majority of the panel is that the order must be to discharge without an acquittal unless otherwise directed by the court. Since the default position is a discharge without acquittal then there must be circumstances on record or the accused must show reasons that the position must be displaced in favor of an acquittal.

[11] Although the default position is that the order is to discharge without acquittal, there remains the unfettered discretion of the court to make an order of acquittal where the facts and circumstances warrant so. That discretion must be exercised judiciously. Zabariah Mohd Yusof FCJ states:

> [92] I have read and examined the authorities and cases referred to, in the judgment and found that, they never ruled on the interpretation to be accorded to s 254(3) of the CPC to the effect that 'the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. In my view, what those cases held were that, the court is vested with the discretionary power to direct an acquittal of an accused person pursuant to s 254(3) of the CPC and that such discretion is to be exercise judiciously. In other words, s 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge to amount to an acquittal, if circumstances warrant it The following cases support this proposition:
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> (a) *Public Prosecutor v Ambika M A Shanmugam* [2021] 2 MLJ 723; [2021] 2 CLJ 522;
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> (b) *Mohamed Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194; [2019] 2 CLJ 28;
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> (c) *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401; [1990] CLJU 85; [1990] 1 LNS 85;

A (d) *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; [1967] CLJU 72; [1967] 1 LNS 72;

(e) *Seet Ah Ann v Public Prosecutor* [1950] 1 MLJ 293; [1950] CLJU 81; [1950] 1 LNS 81;

B (f) *Goh Oon Keow & Anor v Rex* [1949] 1 MLJ 35; [1948] CLJU 14; [1948] 1 LNS 14; and

(g) *Tan Ah Chan v Regina* [1955] MLJ 218; [1955] CLJU 155; [1955] 1 LNS 155.

C ...

[12] In *Public Prosecutor v Lau Ngiik Yin* [2007] MLJU 668; [2008] 10 CLJ 410 the prosecution had applied for an order of DNAA against the accused when the prosecution could not locate one important witness. The accused was
D charged for the offence of murder and he was already in remand for 20 months. Although the court gave the prosecution time to decide whether to continue with the prosecution the court held the view that the court must order an acquittal and not DNAA when the prosecutor has shown disinterestedness in prosecuting the case or the prosecution is not able to prosecute the case for
E good reasons and it is unlikely the case can be prosecuted expeditiously in the short time.

[13] In the Singapore High Court decision of *Goh Cheng Chuan v Public Prosecutor* [1990] 3 MLJ 401; [1990] CLJU 85; [1990] 1 LNS 85 the
F prosecution merely stated that it wished to proceed with the prosecution when it has located its witnesses without saying that it decided to not further prosecute. The prosecution failed to locate its witness on multiple dates and even up until the hearing of the appeal before the High Court. The facts in that case are not too dissimilar with the facts in the present application. In deciding
G to acquit the appellant Thean J expressed:

> ... Even at the hearing before me, ie on 31 May 1990, I was informed by the deputy public prosecutor that the position remained as it was: the material witness was still not available and could not be traced. There was also the information, which was communicated to the district judge on 2 February 1987 and which was not
H disputed by the prosecution, that one of the complainants had passed away. Up to this date, approximately five years have elapsed since the charge was first brought against the appellant, and the charge relates to an offence alleged to have taken place some six and a half years ago. Clearly, the prosecution has had ample time to trace this witness, and the witness still cannot be found, notwithstanding the efforts
I made; the prospect of tracing this witness does not appear to have improved. The deputy public prosecutor informed me that the prosecution intended to proceed with the charge against the appellant and the charge would be proceeded with the moment the witness is found. However, this has been the position since the charge was first brought. While I accept that the charge against the appellant is a serious one and that the right of the prosecution to proceed against the appellant on the

charge should be preserved, I also have to bear in mind that it is unfair to have a charge hanging over his head indefinitely. The court has to consider both public interest and fairness to an accused person, and having regard to both these factors and all the relevant circumstances of this case it is only fair to the appellant that the charge should not be left hanging over his head any longer. In my judgment, the discharge should amount to an acquittal, and I so order. The appeal is therefore allowed.

[14] In *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193; [1985] CLJU 54; [1985] 1 LNS 54 the prosecution applied for an order for discharge not amounting to acquittal after it could not locate its witnesses but it did not an express communication that it did not intend to prosecute the appellant any further. In deciding to allow the appeal the court held that:

... As I read the grounds of decision of the learned District Judge, it was implicit that the practice of the court was to order a discharge not amounting to an acquittal if the prosecution indicated that it was not withdrawing the charge. If this was the practice, as I think it was, I have to say that it was clearly wrong. For the reasons I had given in the earlier appeal, a court has to act judicially and consider both the public interest and any unfairness to an accused person ...

[15] Both decisions in *Goh Cheng Chuan* and *K Abdul Rasheed were* referred in *Vigny Alfred* and also by the Courts of Appeal in *Public Prosecutor v Ambika a/p MA Shanmugam* [2021] 2 MLJ 723; [2021] 2 CLJ 522 and in *Mohamed bin Kanathi Meerah Mydin v Public Prosecutor* [2019] 2 MLJ 194; [2019] 2 CLJ 28.

[16] Reference is also made to *Nicholas a/l Mazivanan v Public Prosecutor* [2024] 12 MLJ 326; [2024] 9 CLJ 736, a recent decision of the High Court sitting in Muar. In that case the facts showed that despite numerous postponements and warnings the prosecution failed to revert with any decision of a representation filed by the accused, there was lack of investigation causing the charge to be in an uncertainty and there was failure to secure attendance of witnesses. It must be noted that in that case there was no decision by the prosecution to not prosecute the accused, he merely requested for a further postponement. The magistrate ordered the accused to be discharged not amounting to an acquittal denying the accused's request to be acquitted. In deciding to grant the order of acquittal, the High Court held that the lack of the prosecution's readiness to prosecute arising from the repeated postponements implied that there was a lack of intention to prosecute the case diligently. The court also held that the court has the power to order an acquittal to prevent injustice and undue hardship to the accused.

[17] After having considered the facts in this application and guided by the

decisions referred to above, this court finds sufficient reasons for this court to exercise its discretion in favor of the applicant. Particularly, the prosecution could not offer any explanation to this court why SP5 remains in Sabah and why he could not make himself available at the trial. SP5 is a police officer and as an officer of the law he should certainly know better his duties to give evidence in a court trial as and when required and it would be his duty to inform the public prosecutor of his whereabouts and his circumstances. From the minutes of the magistrate court on 3 September 2024 this court notes that the prosecution stated that it had informed the Investigating Officer of the need for SP5's attendance but no action was taken. It would appear therefore that not only was the trial scuttled by SP5 but also the Investigating Officer. The fact that the prosecution is at loss over SP5's absence compounded by the Investigating Officers' inaction show that the prosecution does not have control over the conduct of its case as dictated by s 376 of the CPC.

[18] In this court's view the expression 'the prosecution shall have control over the direction of all criminal proceedings and prosecutions' means not only that the prosecution must act honestly, without fear of favour and to ensure that the prosecution of charges are based upon the legitimacy of its evidence and fair play to the accused (see *Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66; *Shiv Kumar v Hukum Chand & Anor* (1999) 7 SCC 467 and *Boucher v The Queen* (1954) 110 Can CC 263), but also that the prosecution must manage its witnesses in the interest of timely conclusion of its case within the time allocated by the court, especially as in the present case when the accused has been DNAA and charged repeatedly.

[19] As expressed by the Court of Appeal in *Bunya ak Jalong v Public Prosecutor* [2015] 5 MLJ 72; [2015] 5 AMR 1; [2015] 5 CLJ 893 a decision to prosecute necessitates the accused to incur time and legal expense to defend himself for which there is no provision that he can recover costs if he is acquitted. Thus the prosecution owes its duty not only to itself and the court but also to the accused. Of course, the accused's expectation of a speedy conclusion of a trial must take into account the realities of the high registration and backlog of cases that the courts experience. However, the fact that the public prosecutor has greater number of cases to prosecute in current times compared to 1987 when the case in *Public Prosecutor v Choo Chuan Wan*g was decided, should serve to remind the public prosecutor of the importance of managing and conducting his cases with even tighter rein so that they can be completed within the allocated dates. Failure to do so will result not only in the public prosecutor clogging his diary but also the court's. Thus, unless there are truly extenuating circumstances or excused by the court, the prosecution must

ensure its witnesses are present when they are required to, more so when they are officers of the law. A

[20] This court is reminded of the views expressed by the Court of Appeal in *Tan Hoo Eng v Pendakwa Raya* [2019] MLJU 622; [2019] CLJU 893 that in considering the issue of delay, there must be a balance of the interest concerned, not only of the accused person but also interest of the society and public at large, in the enforcement of the law to curb crimes. B

[21] However, the facts in this application show that the prosecution has had three opportunities under three separate cases to ensure the presence of SP5 but failed to do so. Although this court does not find that there has been inordinate delay in the conduct of the trials since each of the trials took place in 2024, the fact remains that the prosecution is unable to proceed with its case without SP5. Although the prosecution maintains its intention to continue with the prosecution of the charge against the applicant, it would be a grave injustice on the applicant to have the charge looming over his head without any foreseeable certainty on when exactly the prosecution can conclude its case with the attendance of SP5. The applicant is stuck with the stigma that the public may perceive him of being guilty when he is charged over and over again with no prospect for him to present his defense. He is a public servant and it is not difficult to estimate the level of anxiety he must endure in facing the uncertainties of the trial. C D E

[22] Thus, this court takes the same position as decided in *Goh Cheng Chuan* that the public prosecutor's preference to not expressly communicate that he does not propose further to prosecute the accused upon the charge but instead to just state that he intends to proceed with the prosecution after he has located his witness does not preclude this court's discretion to order an acquittal under s 254(3) of the CPC: F G

> However, it is to be observed that *the deputy public prosecutor in invoking this section never uttered a word to the effect that she would 'not further prosecute' the accused. On the contrary, in applying for 'an order of discharge not amounting to an acquittal' she said, among other things, that 'the prosecution fhadi every intention to proceed against the two accused' once the material witness was found*. This ingenious move, it seems to me, was adopted to obviate the difficulty which was considered to be faced by the prosecution in *Abdul Rasheed* [1985] 1 MLJ 193. Such a move is undesirable, as it is unclear and confusing. If that section is invoked, it can only operate on the basis that the prosecution 'will not further prosecute' the accused. The decision whether to prosecute or not rests entirely with the prosecution: it is for the prosecution to decide whether or not it will further prosecute the accused on the charge in question; if it so decides not to do so, it ought to inform the court in clear terms. Upon the prosecution informing the court that it will not further prosecute the accused on the charge, the section comes into operation, and by virtue of its express terms all the proceedings on the charge against the accused are stayed and the H I

A accused is discharged and such discharge shall not amount to an acquittal unless the court so directs or except in cases coming under s 177 (this section is irrelevant for the purpose of this appeal). Therefore, in an ordinary case, the order of discharge under s 184 does not amount to an acquittal. That this is the nature of the order is dictated by the express terms of the section and not by what the prosecution told the B court as regards its intention on the future prosecution of the accused on the charge.

...

However, once he has instituted criminal proceedings against an accused on a charge and the proceedings are before the court, the conduct of such proceedings is C subject to the overall control of the court. If a question in issue arises — whether one of fact or of law-then it is undoubtedly for the court to determine; indeed, the court is under an obligation to determine it. In determining such a question, including, where appropriate, exercising its discretion, if any, conferred by law, whether against the public prosecutor or otherwise, the court is not 'whittling down' the authority and powers of the Attorney General as the public prosecutor. D

...

I now revert to s 184(2) of the Criminal Procedure Code. With respect, I am unable to agree with the learned district judge on the limited and narrow construction he placed on the words, 'unless the court so directs', in s 184(2). The words are E unambiguous and clear, and effect must be given to them: they give to the court an unfettered discretion to direct, in appropriate circumstances, that the discharge shall amount to an acquittal. Section 184 subsists independently on its own, and its scope or operation is not limited by s 180 or other provision of the Criminal Procedure Code. There is therefore no justification for holding that the court can F only exercise such discretion in the instances enumerated in s 180 of the Criminal Procedure Code or when the prosecution informs the court that it will not further prosecute the accused and, in addition, formally withdraws the charge against the accused or has signified its consent to an acquittal of the accused.

Where prosecution has been instituted against an accused on a charge, the decision G whether or not to prosecute further the accused on the charge is one for the public prosecutor to make. Once he has made the decision not to prosecute the accused further, he ought in conformity to that section to inform the court of his decision and s 184(1) comes into operation. For the purpose of s 184(2) he ought to further to inform the court of all relevant matters, for example, as in this case, the difficulty H of tracing a material witness and his intention as to the likelihood of future prosecution of the accused on the charge. It is then for the court to decide whether it should direct that the discharge shall amount to an acquittal. The court is vested with a discretion by the express terms of this section and that discretion is, in my opinion, unfettered; but, of course, it must be exercised judicially, taking into consideration all the relevant facts and factors placed before it, including the I intention of the public prosecutor as to the future prosecution of the accused on the charge. That, in substance, is how the section operates. (Emphasis added.)

[23] It is an anathema to the principle of fair play and justice to allow the prosecution to use the provision of s 254 of the CPC to hold on to the charge

and then charge an accused repeatedly on the basis that it intends to still prosecute the accused despite it being clear that there remains unresolved impediments in the progress of a trial. To allow such situation to continue without certainty when such impediments can be resolved would amount to an abuse of process of court.

[24] It is this court's firm view that when the conclusion of its case cannot be achieved despite multiple orders of DNAA and repeated refiling of a charge against the accused as in this application then the prosecution should not stand in the way of the accused's discharge and acquittal on the grounds of fair play and justice towards the accused. The prosecution must bear the consequences of its own failures. As held by the court in *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166; [2024] CLJU 1143:

> Section 187(1) of the SS Code is identical with s 254(H) and the application was made under that section so that it is clear that the learned magistrate had power to order an acquittal.
>
> If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.
>
> Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal.

DECISION

[25] Based on the facts of this application, there are merits to justify the exercise of this court's powers of revision and judicial discretion. The magistrate's order of discharge not amounting to acquittal in Case MA-82D-28–08 of 2024 is hereby substituted with an order of discharge amounting to acquittal. The applicant is accordingly discharged and acquitted of the charge. Bail is ordered to be returned.

Magistrate's order of DNAA substituted with order of DAA; applicant was discharged and acquitted of the charge; bail was ordered to be returned.

Reported by Dzulqarnain Ab Fatar